Office Supreme Court, U.S.
FILED
MAR 8 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 784

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

LORAINE ELLIOTT, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THEODORE L. LOCKE,
HUGH E. REYNOLDS, JR.,
750 Consolidated Building
Indianapolis, Indiana,
Counsel for Petitioner.

Central Publishing Company, Inc., Indianapolis, Ind.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented For Review	2
Statement Of The Case	3
Statutes Involved	4
Reasons For Granting The Writ	4
Conclusion	15
Appendix	17

CITATIONS

Bishop v. Weber, 139 Mass. 440, 1 N. E. 154 (1885)	8
Bower v. Bower, 225 F. (2d) 618 (1958, 9th Cir.)	13
Burkhardt v. Bates, 296 F. (2d) 315 (1961, 6th Cir.)	13
Central Electric and Gas Company v. City of Stromsburg, Neb., 289 F. (2d) 217 (1961, 8th Cir.)	13
Citrigno v. Williams, 255 F. (2d) 618 (1958, 9th Cir.)	13
Coca Cola Bottling Works v. Williams, 111 Ind. App. 502, 37 N. E. (2d) 702 (1941)	7, 8
Erie v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 (1938)	5
Gahimer v. Virginia-Carolina Chemical Corporation, 241 F. (2d) 836 (1957, 7th Cir.)	2, 9
Holland Furnace Company v. Nauracaj, 105 Ind. App. 574, 14 N. E. (2d) 339 (1938)	7, 8
Laudeman v. Russell, 40 Ind. App. 32, 91 N. E. 822 (1910)	5
McCloud v. Leavitt, 79 F. Supp. 286 (1948)	7, 11

CITATIONS—Continued

	Page
Miller v. Concordia Teachers College, 296 F. (2d) 100 (1961, 8th Cir.)	13
Norton v. Sewall, 106 Mass. 143, 8 AM Rep. 298 (1871)	8
Rudd-Melikian, Inc. v. Merritt, 282 F. (2d) 924 (1961, 6th Cir.)	13
Texaco-Cities Service Pipe Line Company v. Aetna Cas. & S. Co., 283 F. (2d) 912 (1960, 8th Cir.)	13
Transport Manufacturing & Equipment Company et al. v. Fruehauf Trailer Company, 295 F. (2d) 223 (1961, 8th Cir.)	13
Travelers Indemnity Co. v. National Indemnity Co., 292 F. (2d) 214 (1961, 8th Cir.)	13
Travis, Admx. v. Rochester Bridge Company, 188 Ind. 79, 122 N. E. 1 (1919)	5, 6
Walters v. Prudential Ins. Co., 296 F. (2d) 140 (1961, 8th Cir.)	13
Wojciuk v. United States Rubber Co., 13 Wis. (2d) 173, 108 N. W. (2d) 149 (1961)	11
Burns' Ind. Stat. Ann. Section 4-215	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. _____

GENERAL MOTORS CORPORATION, *Petitioner*,

v.

LORAINE ELLIOTT, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, General Motors Corporation, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above case on November 8, 1961.

OPINIONS BELOW

The District Court for the Southern District of Indiana, Indianapolis Division, did not issue a written opinion. The

majority and dissenting opinions of the Court of Appeals for the Seventh Circuit are reported at 296 F. (2d) 125. The opinions are appended hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was made and entered into on the 8th day of November, 1961. Petition for rehearing was denied on the 14th day of December, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

This case presents the following questions:

1. The extent to which the Circuit Court of Appeals may review a determination of the law of the State of Indiana reached by a Federal District Judge who is an Indiana lawyer sitting in the Southern District of Indiana, when the determination of the District Court as to the law of Indiana is a permissible conclusion from the decisions of the Supreme and Appellate Courts of Indiana.

2. Whether the Court of Appeals may determine the law of the State of Indiana by relying upon a decision of a Federal District Judge sitting in Illinois which decision was never appealed and said District Judge at a later date sitting as a Judge of the Court of Appeals for the Seventh Circuit concurred in an opinion which affirmed the judgment of the District Court for the Southern District of Indiana in which it was held that the privity of contract rule still was the law of the State of Indiana.

3. That on February 18, 1957, the Court of Appeals for the Seventh Circuit in *Gahimer v. Virginia-Carolina Chemical Corporation*, 241 F. (2d) 836 (1957), affirmed a judg-

ment of the District Court for the Southern District of Indiana in which case the District Judge, an Indiana lawyer, held that the privity of contract rule applied in Indiana, and neither the Appellate nor Supreme Court of Indiana have decided any cases subsequent to said decision which would change or alter the Indiana rule as to privity of contract. Can this decision be reversed in the absence of further Indiana decisions subsequent thereto?

4. Whether the United States Court of Appeals for the Seventh Circuit decided the case originating in the State of Indiana and governed by the law of that state, involving a suit for negligence against the manufacturer of an automobile instituted by a party not in privity of contract with the manufacturer, in a manner in conflict with the applicable Indiana law.

STATEMENT OF THE CASE

This is a claim brought by respondent in the United States District Court for the Southern District of Indiana to recover for personal injuries received as a result of the alleged negligence of petitioner. Jurisdiction was invoked by reason of diversity of citizenship and that the matter in controversy exceeded the sum of $10,000.00 exclusive of interest and costs as provided under 28 U.S.C.A. 1332.

The district court granted a motion to dismiss by petitioner for respondent's failure to state a claim upon which relief could be granted. The decision of the district court was reversed in a 2 to 1 decision by the United States Court of Appeals for the Seventh Circuit. The errors relied upon arise out of the action of the Court of Appeals in reversing the district court.

The complaint is drawn in a single paragraph (App. below, pp. 2-4). The complaint alleges generally that re-

spondent received personal injuries while performing repairs on an automobile manufactured by petitioner in the course of respondent's duties as a mechanic employed by one of petitioner's authorized dealers in Indiana. It alleges that while respondent was using a wrench with his arm extended through a splash shield underneath the automobile's engine his hand slipped off the wrench. He cut himself against the sharp edge of the shield. The specific acts and omission of negligence are detailed in six subparagraphs in respondent's complaint. (App. below, pp. 2-4). They may be summarized as alleging that petitioner negligently and carelessly manufactured and assembled a defective splash shield in that its edges were sharp rather than blunt. Respondent asserted that by reason of such fact the shield was dangerous and unsafe for mechanics using the opening to gain access to the engine. The complaint also alleged that petitioner had distributed service manuals which contained pictures showing the edge of the splash shield to be blunt when in fact in this case it was sharp. However, it failed to allege that respondent relied upon the pictures in said manual.

Petitioner's answer to plaintiff's complaint alleged certain theories of defense in addition to admitting and denying the allegations of respondent's complaint. However, the only defense pertinent herein is the first defense that of failure to state a claim upon which relief could be granted.

STATUTES INVOLVED

Pertinent parts of Burns' Indiana Statutes Annotated, Section 4-215 are set out in the appendix at page 26.

REASONS FOR THE GRANTING OF THE WRIT

That the United States Court of Appeals for the Seventh Circuit failed to follow the decisions of the Supreme

and Appellate Courts of Indiana in a case in which the law of Indiana was controlling in violation of the decision of this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

The opinion and decision of the United States Court of Appeals for the Seventh Circuit in this case overruled the judgment of the District Court, sitting in Indiana, presided over by an Indiana lawyer, who reached a permissible conclusion in construing Indiana law. This reversal is in conflict with the rules presently followed in the Sixth, Eighth and Ninth Circuits.

UNDER THE COMPLAINT, THE LACK OF PRIVITY OF CONTRACT BETWEEN PETITIONER AND RESPONDENT IS FATAL TO RESPONDENT'S CAUSE OF ACTION

A. In Indiana for one to recover for injury suffered as a result of the negligent manufacture of a product, he must be in privity of contract with the manufacturer, unless he falls within certain well defined exceptions to the privity rule not applicable here.

The law in Indiana as it relates to a manufacturer's liability to persons not in privity of contract with the manufacturer is well settled. The Indiana rule is established by the following two cases:

Landeman v. Russell, 46 Ind. App. 32, 91 N. E. 822 (1910);

Travis, Admx. v. Rochester Bridge Company, 188 Ind. 79, 122 N. E. 1 (1919).

In the *Landeman* case, the Appellate Court of Indiana affirmed a judgment where the lower court had sustained a demurrer to the complaint because it failed to allege the existence of privity of contract between plaintiff's decedent and the manufacturer. This decision has never been

overruled. In this case the court stated that cases involving the asserted liability of a manufacturer to persons not in privity may be grouped into three classes. The first class is where the thing causing injury is of a noxious or dangerous kind, such as poisonous drugs under a false label; the second class is where the defendant has been guilty of fraud or deceit. The court states that in these two classes recovery is permitted against a manufacturer. However, the third class is where the defendant is negligent with reference to the sale or construction of an article not in itself dangerous. In the third class of cases, the court held:

> "... as to all such articles there is no general or public duty, but the only duty the manufacturer and vendor of a machine owes, flows from a contract, and he is not, therefore, liable to a third person, and a stranger to the contract, for injuries by reason of negligence in the construction of such article." p. 37

The court held this to apply to the manufacturer of a boil of which plaintiff alleged was not safe because of a defective seam.

The Supreme Court of Indiana in the case of *Travis v. Rochester Bridge Company*, supra, stated the rule of law to be:

> "It may be stated as a general rule that the manufacturer of products which, in their nature, are not inherently dangerous in use when free from defects, rests under no duty to exercise care in their manufacture for the safety of persons with whom he has no privity of contract."

Neither the *Landeman* case nor the *Travis* case has been overruled or contravened by the Appellate or Supreme Court of Indiana.

The Indiana District Judge in this case in reliance upon these Indiana decisions reached the permissible conclusion that under Indiana law plaintiff had failed to state a claim upon which recovery could be based.

As we shall demonstrate by analysis of the cases relied upon by the Court of Appeals in reversing the Indiana District Judge, the conclusion reached by the District Judge was not only a permissible conclusion, but the only possible conclusion to be reached under the Indiana law.

The Court of Appeals has primarily relied on the following three cases:

Coca Cola Bottling Works v. Williams, 111 Ind. App. 502, 37 N. E. (2d) 702 (1941);
Holland Furnace Co. v. Nauracai, 105 Ind. App. 574, 14 N. E. (2d) 339 (1938);
McCloud v. Leavitt, 79 F. Supp. 286 (1948).

An examination of the Indiana cases relied upon by the Court of Appeals reveals that neither case changed nor modified the *Landeman* or *Travis* decisions. *The Coca Cola Bottling Works* case involved the negligent production and sale of a food product. The defendant bottling company had negligently allowed a bottle of its beverage to reach the consuming public in an adulterated and harmful condition, i.e., it contained small pieces of concrete. The plaintiff purchased the particular bottle in a restaurant which had purchased it from the defendant. The Appellate Court of Indiana in upholding the plaintiff's recovery stated:

> "The rule now in the best reasoned cases is that the manufacturer of foods or bottled goods sold for human consumption may be held liable to the ultimate consumer for injuries caused by foreign deleterious substances in such goods, regardless of whether or not there was privity of contract between them." p. 512

This decision is within the established exception to the privity of contract rule, and in no way conflicts with either the *Laudeman* or *Travis* case. As was pointed out, the *Laudeman* case stated as an exception those cases which involved products made for human consumption. This is demonstrated by the class of cases cited for the exception of "noxious" products. These cases include the food and drug cases as for example the case of *Bishop v. Weber*, 139 Mass. 440, 1 N. E. 154 (1885). Likewise, the Court in the *Travis* case recognized the exception and cited the case of *Norton v. Sewall*, 106 Mass. 143 (1871) which involved the sale of rhubarb.

The *Coca Cola Bottling Works* case involved a food product for human consumption. The opinion did not purport to change the privity of contract rule stated in the *Laudeman* and *Travis* cases which recognized food and drug cases to be an exception.

In the *Holland Furnace Company* case the plaintiff was the owner of a building located in East Chicago, Indiana. It was leased to one Brecka. Brecka contracted with the defendant furnace company to install a furnace in the building which was done in violation of a city ordinance requiring certain protective measures when a metal furnace was installed near unprotected woodwork. Shortly after the installation a fire broke out burning a hole in the floor. The plaintiff demanded that the furnace be removed but the defendant furnace company and Brecka contrary to the demands of the owner of the building reinstalled the furnace in a negligent manner and in violation of the city ordinance. Shortly thereafter a fire destroyed the entire building. The Appellate Court of Indiana upheld the plaintiff's right of recovery of damages resulting from the negligent and illegal installation of the furnace.

The facts of this case clearly distinguish it from the rules of the *Travis* and *Landeman* cases. Here, a contractor knowingly installed a furnace in a manner that was likely to cause injury to the plaintiff, and in violation of a city ordinance.

The case of *Gabriner v. Virginia-Carolina Chemical Corporation*, 241 F. (2d) 836 (1957), decided by the Court of Appeals for the Seventh Circuit upheld the privity of contract rule in Indiana and its opinion said:

> "Plaintiffs rely upon two cases in support of an opposing view, *Pern Heating Company v. Lenhart et al.*, 48 Ind. App. 319, and *Holland Furnace Company v. Nauracay et al.*, 105 Ind. App. 574. Neither of these cases involves negligence by manufacturer. In *Pern*, defendants were charged with negligence in the maintenance of plumbing which resulted in an overflow of water, thereby damaging plaintiffs' merchandise. The case was decided long prior to the decision of the Supreme Court in *Travis*, from which we have previously quoted. Holland was sued for negligence in the installation of a furnace on plaintiff's property, which caused a fire with resultant damages. The Court held that even though there was no privity of contract plaintiff was entitled to recover. This case was decided subsequent to both *Pern* and *Landeman*, which were cited and distinguished as evidenced by the following statement in the opinion. (page 580):
>
> > "'If the thing sold or constructed be not imminently dangerous to human life, but may become such by reason of some concealed defect, then a liability may arise against such vendor or constructor if he knew of the defect and fraudulently concealed it.'
>
> "Even though we assume that which we think is not a fact, that is, that defendant's fertilizer when free from defect was dangerous and unsafe for use for the

purpose for which it was intended, there is not the slightest basis for holding that defendant had knowledge of any defect concerning which it was under obligation to notify plaintiffs. In view of the decisions in *Travis* (188 Ind. 79) and *Laudeman* (46 Ind. App. 32), and particularly the former, we must conclude that plaintiffs, under the rule in Indiana, could not maintain their action under count 1 because of a lack of privity. It follows that the action of the court in directing a verdict on that count must be sustained." p. 841.

The Seventh Circuit in the *Gahimer* case correctly applied Indiana law relating to the duty of a manufacturer to those not in privity. This result was reached by virtue of the *Travis* and *Laudeman* decisions. The *Holland Furnace* case was rejected not because it was not the law but because it was distinguishable from *Laudeman* and *Travis*, inapplicable to a manufacturer and based on an intentional violation of a legal duty.

Yet in this case the Seventh Circuit has reversed its own prior decision in the *Gahimer* case, and disregarded the clear language of *Laudeman* and *Travis* cases even though there were no Indiana decisions on this point subsequent to *Gahimer*. To justify this the Seventh Circuit asserts that *Gahimer* may be disregarded because the opinion does not disclose that the Court in *Gahimer* considered the *Coca Cola* case or the fact that the Indiana Supreme Court denied a petition to transfer in the *Holland Furnace* case.

The *Coca Cola* case was probably not relied upon by plaintiff in *Gahimer* because it is so clearly inapplicable that counsel there did not feel his appeal would be enhanced by its use. In any event, it does not purport to change *Travis* or *Laudeman* as previously indicated and certainly could not justify the decision of the Seventh Circuit here.

The Seventh Circuit did consider and reject the applicability of the *Holland* case in *Gahimer*. Thus the fact that the decision was approved by the Supreme Court of Indiana's denial of petition to transfer even if known to the Court in *Gahimer* would have made no difference since its rejection was on the basis of applicability not on the basis of relative priority between *Holland* on the one hand and *Travis* and *Landeman* on the other. In fact denial of the petition to transfer to the Indiana Supreme Court in *Holland* must have been based on the determination that the opinion in *Holland* did not contravene *Travis*. (Burns' Indiana Statutes, Annotated, Sec. 4-215, Clause 2.)

The *McCloud* case has no standing as authority for the Court of Appeals' holding. This case was decided by a District Court sitting in Illinois and was never appealed. Surely, the Court of Appeals would be required to give more weight to the decision in this case of the District Court Judge sitting in Indiana on a question of Indiana law than that of an Illinois judge attempting to construe Indiana law. In any event, Judge Lindley seven years after his decision in the *McCloud* case, while sitting on the Court of Appeals for the Seventh Circuit, concurred in the *Gahimer* decision which held that Indiana adheres to the privity of contract rule. This certainly would destroy what little basis might otherwise exist for reliance on the *McCloud* decision.

In its opinion the Court of Appeals for the Seventh Circuit has relied on one other case, *Wojciak v. United States Rubber Company*, 13 Wisc. (2d) 173, 108 N. W. (2d) 147 (1961). There the Supreme Court of Wisconsin purported to apply Indiana law to the effect that lack of privity of contract would not defeat recovery in an action for negligent manufacture. The Wisconsin court stated that al

though the Indiana Supreme Court had never overruled its holding in *Travis* specifically this had been done by implication through the *Coca-Cola* case. This determination is unsupportable, first, because the *Coca-Cola* case falls within a well known exception to the privity of contract rule involving food and drugs which are not applicable here, were inapplicable in the *Worcalo* case and was recognized in, but inapplicable to, the *Travis* case. Secondly, the decision of the Indiana Appellate Court even if followed by a denial of a petition to transfer does not expressly or impliedly overrule a prior decision of the Supreme Court of the State of Indiana. In fact, the *Coca-Cola* case does not purport to expressly or impliedly overrule the decision in the *Travis* case. Thirdly, as was pointed out heretofore, by denying the petition to transfer in the *Coca-Cola* case the Supreme Court of Indiana necessarily determined that it did not contravene the prior decision of the Supreme Court in the *Travis* case. Finally, as was pointed out before, the decision of the Wisconsin Court and of lawyers unfamiliar with Indiana law would have no particular weight when compared with the decisions of the Indiana courts and of the Indiana District Judge in this case who applied Indiana law with which he is familiar.

B. The decision of a Federal District Judge as to the law of the State in which he sits, should not be reversed by a Court of Appeals if it is a permissible conclusion from the decisions of that State.

The Courts of Appeals for the Sixth, Eighth and Ninth Circuits have held, that the decision of a District Judge, as to the law in the State in which he sits, will not be reversed if it is permissible under the decisions of that State.

The Courts of Appeals will not attempt to substitute their judgment for that of the District Judge who is familiar with his local law, in such cases.

Burkhardt v. Bates, 196 F. (2d) 315 (1961, 6th Cir.);
Central Electric and Gas Company v. City of Stromsburg, 289 F. (2d) 217, 220 (1961, 8th Cir.);
Rudd-Melikian, Inc. v. Merritt, 282 F. (2d) 924, 929 (1960, 6th Cir.);
Texas Cities Service Pipe Line Company v. Aetna Cas. & S. Co., 283 F. (2d) 912, 914 (1960, 8th Cir.);
Miller v. Concordia Teachers College, 296 F. (2d) 100 (1961, 8th Cir.);
Cabrera v. Williams, 255 F. (2d) 675, 679 (1958, 9th Cir.);
Walters v. Prudential Ins. Co., 296 F. (2d) 140 (1961, 8th Cir.);
Bower v. Bower, 255 F. (2d) 618, 619 (1958, 9th Cir.);
Travelers Indemnity Co. v. National Indemnity Co., 292 F. (2d) 214, 220 (1961, 8th Cir.);
Transport Manufacturing & Equipment Company, a Corporation, and Ross & Compson, Inc., a Corporation v. Fruehauf Trailer Company, a Corporation, 295 F. (2d) 223 (1961, 8th Cir.).

In the *Burkhardt* case the court said:

"The factual and legal basis for the conclusion of Judge Graven, who heard this case, that the appellant's personal injury action was barred by the Iowa two-year statute of limitations, I.C.A. Sec. 614.1, subd. 3, is fully and fairly stated by the Judge in his opinion reported in D.C., 191 F. Supp. 149. What he has said need not be repeated or paraphrased by us. Unless we were able to demonstrate that his ultimate conclusion was not a permissible one because induced by a clear misconception or misapplication of Iowa law, there could be no reversal." p. 316.

The merit of such a ground rule in the appeal of diversity cases is so obvious as to require no comment. In fact, there is no stated rule in any other Circuits to the contrary. Yet it is obvious from an examination of the decision of the Court of Appeals for the Seventh Circuit in this case, and of the Indiana cases on the legal issue herein, that the Seventh Circuit has disregarded that rule. It has clearly substituted its own judgment as to what the law of Indiana should be rather than what it really is. In any event, the decision of the District Court was a permissible one. Thus, the Seventh Circuit by its opinion herein has adopted a philosophy of procedure contrary to that of the Sixth, Eighth and Ninth Circuits.

When faced with this question, the District Judge had before him two Indiana cases, *Travis* and *Landeman*, each of which, in express language, stated that the Indiana law would deny relief to respondent herein. Furthermore, the United States Court of Appeals for the Seventh District in 1957, had reviewed the Indiana law and reached the same conclusion on facts not distinguishable from those herein. There have been no Indiana decisions asserted to be applicable herein handed down since 1957. Under these circumstances, the District Court obviously reached a permissible conclusion that the law of Indiana required a dismissal of the complaint.

The Seventh Circuit in substituting its judgment for that of the District Court, and reversing the decision herein, completely ignored the fact that the District Judge relied upon specific and express language of decisions of both the Indiana Appellate and Supreme Courts, and of a decision on Indiana law of the Seventh Circuit to reach his conclusion. The Seventh Circuit reached an opposite conclusion solely on the basis of decisions of Courts, other than those

of the State of Indiana, or of decisions of the Indiana Appellate Court, readily distinguishable on their facts from the allegations of plaintiff's complaint here, and from the decisions in the *Travis* and *Landeman* cases. Furthermore, the Seventh Circuit held that *Travis*, *Landeman* and *Gahimer* no longer correctly stated the law of the State of Indiana based upon decisions which were not only inapplicable, but did not purport by their language to reverse or modify the decisions in *Travis* and *Landeman*. The *Coca Cola* case, in fact, specifically applied an exception recognized in both the *Landeman* and *Travis* cases.

For these reasons, the decision of the Seventh Circuit has been reached upon a premise which conflicts with the rules adopted by the Sixth, Eighth and Ninth Circuits. It must be reversed if it be determined, as it must, that the decision of the District Court as to the law of Indiana was permissible.

CONCLUSION

It is submitted that the judgment and decision of the District Court for the Southern District of Indiana correctly applied the law of the State of Indiana as established by the decisions of the Supreme and Appellate Courts of the State of Indiana.

The decision of the District Court for the Southern District of Indiana under the accepted rules of construction should have been affirmed by the United States Court of Appeals for the Seventh Circuit if that decision was a permissible one under the law of the State of Indiana. Not only did the decisions of the State of Indiana support the District Court in its judgment and opinion but the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Gahimer v. Virginia-Carolina Chemical Corp.*,

decided that the correct rule of law in Indiana at that time required privity of contract as a basis for an action against a manufacturer for negligent manufacture of a product. Between the date of the decision in the *Gahimer* case and the decision and judgment of the District Court in this case there were no decisions by either the Appellate or Supreme Court of Indiana.

The United States Court of Appeals for the Seventh Circuit by its opinion and judgment in this case has incorrectly interpretated the law of Indiana relating to the issue of privity of contract and undertaken to superimpose its view of what the law ought to be rather than what the law was. The United States Court of Appeals for the Seventh Circuit, in disregard of its judicial duties in diversity of citizenship cases, has failed to follow the controlling Indiana decisions as announced by the Appellate and Supreme Courts of Indiana by the District Court sitting in Indiana and the opinion of the United States Court of Appeals involving the same issue where there were no subsequent opinions or decisions to justify a change of the law of the State of Indiana.

It is, therefore, respectfully submitted that the opinion and judgment of the United States Court of Appeals for the Seventh Circuit be set aside and that the judgment of the District Court for the Southern District of Indiana be affirmed.

Respectfully submitted,

THEODORE L. LOCKE,
HUGH E. REYNOLDS, JR.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 13353

Before Schnackenberg, Knoch and Castle, Circuit Judges.

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Loraine Elliott, plaintiff, has appealed from an order of the district court dismissing his action for damages against General Motors Corporation, a Delaware corporation, thereby sustaining defendant's contention that plaintiff's complaint failed to state a claim against defendant upon which relief can be granted.

So far as here relevant, the complaint alleges that defendant, a manufacturer and distributor of passenger automobiles, manufactured and assembled a certain Chevrolet automobile, and as a part thereof a splash shield was bolted and attached to the underneath side of the automobile near the front end, which shield was a single sheet of metal approximately 28 inches by 12 inches in size with an opening approximately 11 inches by 7 inches, which opening was designed to permit mechanics to insert their hand and arm through the opening and perform necessary work or labor, and gain entrance to the automobile's engine and

oil pan from beneath the automobile. The shield in question was defective, hazardous and dangerous in that the edge of the opening was so pressed or formed that it had a sharp knife-like cutting edge, which condition was concealed from view. Said Chevrolet was then sold to a named distributor of Columbus, Indiana, who sold it to William Weisner. On December 3, 1958, Weisner took the automobile to the distributor for repairs by having the engine's piston rings replaced, while plaintiff was employed by the distributor as a mechanic. He was assigned to the job. While plaintiff lay on his back underneath said automobile with his hand extended through said splash shield opening, removing fan pulley bolts and loosening connecting rod bolts with a socket wrench, his hand slipped from the wrench throwing the wrist of his right arm into and against the sharp dangerous and defective edge of said splash opening causing the wrist and tendons to be severely cut, and there was severance of the median nerve, flexor tendons of the hand, muscles, and arteries of the right arm. His right hand and arm have been permanently disabled and he has not been able to carry on his trade as a mechanic. Past and future loss of wages, and hospital and medical expenses are also alleged.

The complaint charges that these injuries solely and proximately resulted from the following negligent and careless acts and omissions of defendant, referred to as G.M.C.:

(1) G.M.C. negligently and carelessly assembled said defective splash shield with the edge of its opening in a sharp rather than blunt condition, knowing that said opening was designed for and would be used by mechanics, such as this plaintiff, in making various engine repairs, and when it further knew that the hands, arms and wrists of such mechanics would be in close proximity to said sharp and hazardous opening which would cause injuries thereby.

(2) At the time said automobile was sold by G.M.C., the opening of said splash shield had an extremely sharp edge and thereby was dangerous and unsafe for mechanics to use to gain access to the underneath side of the automobile engine, which was the purpose for which said shield and its opening was designed; and at that time G.M.C. knew, or by the exercise of ordinary care could have known, of said dangerous and unsafe condition of said splash shield, but wholly failed to notify and warn the purchaser of such defect.

(3) That G.M.C. negligently and carelessly manufactured and assembled said defective splash shield to said automobile, knowing that the opening thereon was designed for and would be used by mechanics and other persons, such as this plaintiff, in gaining access to the underneath side of the vehicle's engine in making various repairs thereto, and when said G.M.C. further knew that the hands, arms and wrists of such persons would be in close proximity to the sharp and hazardous opening of said splash shield and that the same was imminently dangerous and would cause injuries to the persons so using said opening.

(4) That G.M.C. knew, or by the exercise of ordinary care could have known, of the defective condition of said splash shield, and that G.M.C. carelessly and negligently sold and delivered said automobile when it was in such negligent defective condition as to be imminently dangerous to persons so using said splash shield and its opening.

(5) That G.M.C. carelessly and negligently failed to inspect said splash shield before assembling the same on said automobile when it knew that a splash shield, such as herein described, would be imminently dangerous to persons using the same.

(6) That G.M.C. distributed service manuals throughout the state to its service garages for use by mechanics, including one used by this plaintiff, instruct-

ing mechanics to use said splash shield opening in doing work such as this plaintiff was engaged [sic] at the time of his injury, wherein a picture was contained misrepresenting said splash shield by showing its edge to be blunt and safe for use, whereas it was in fact in a hazardous and unsafe condition imminently dangerous to persons using it as heretofore set out, and said G.M.C. having knowledge of all these facts, negligently and carelessly failed to notify this plaintiff, a mechanic at its said authorized service garage, of said dangerous and defective splash shield and warn against using its said opening as required by the instructions in said service manual.

In this court, defendant contends that, in Indiana, in order for one to recover for injury suffered as a result of the negligent manufacture of a product, he must prove that he is in *privity of contract* with the manufacturer, or that he is entitled to recover under one of the well-defined exceptions to the privity rule.

On the other hand, it is the theory of plaintiff that the question of liability arising from the negligent manufacture of products is not limited to the presence or absence of *privity of contract* between the injured party and the manufacturer, but rather is a matter of whether it is foreseeable that injuries would naturally and probably flow from the *negligence* charged.

1. Neither party claims that plaintiff was in privity with defendant and such a claim would find no basis in the facts. Therefore, it is clear that we should not be diverted by any purposeless discussion of the law of privity from considering if we have here a simple case of a person who, according to the complaint, was injured by the tortious conduct of the defendant. It is elementary that a tort-feasor may be liable to anyone proximately injured by his negligent con-

duct, unless the latter is contributorially negligent. That the injured person may be an employee of one who has rights under contract or warranty against the tort-feasor is irrelevant in a suit by the injured person. The injured person might even be, for instance, a pedestrian or a traffic policeman.

The briefs are concerned with the applicability of the rule established by Justice Cardozo in the leading case of *MacPherson v. Buick Motor Co.* (1916), 217 N. Y. 392, 111 N. E. 1050.

In *MacPherson*, plaintiff was injured when an automobile in which he was riding suddenly collapsed, due to a defective wheel. He sued the manufacturer of the automobile on a charge of negligence. Plaintiff had bought the car from a retail dealer. The wheel had been made by another and sold to the manufacturer who failed to inspect it. The court said, at 1053:

> "... If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.
>
> ...
>
> "... We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law."

It is clear that in *MacPherson* no reliance was placed by the court upon the privity rule.

A conflict exists between the parties to this suit as to whether *MacPherson* has been adopted as the law in Indiana. Defendant insists that it has not and, for its authority, relies on *Travis v. Rochester Bridge Co.* (1919), 188 Ind. 79, 122 N. E. 1, and *Laudeman v. Russell & Co.* (1919), 46 Ind. App. 32, 91 N. E. 822; which according to defendant's brief adopted a rule of law stated by an English court 119 years ago [*Winterbottom v. Wright* (1842), 10 Mees & W 109, 152 Eng. Reprint 402]. However, plaintiff contends that, by court decisions as recent as 1938 and 1941, Indiana approved the rule in *MacPherson* and that *MacPherson* is applicable to the case at bar. This conflict we must resolve.

MacPherson was cited approvingly in *Coca Cola Bottling Works v. Williams* (1941), Appellate Court of Indiana, *en banc*, 111 Ind. App. 502, 37 N. E. (2d) 702, 706, and its holding was in effect approved by a reference to the "imminently dangerous" rule in *Holland Furnace Co. v. Nauracaj* (1938), 105 Ind. App. 574, 14 N. E. (2d) 339, 342. In each of these two cases a petition to transfer was denied by the Indiana Supreme Court. The effect thereof is that the conclusions reached by the Appellate Court were approved by the Supreme Court. *Smith v. State*, 169 Ind. 260, 82 N. E. 450, 451, citing the second clause of section 1337j, Burns' Ann. Stat. 1901, now Burns' Ind. Stat. Ann. (1933), 1946 Replacement, § 4-215, p. 1122. This result has been emphasized by the Wisconsin Supreme Court which, in the 1961 case of *Wojciuk v. United States Rubber Co. et al.*, 13 Wis. (2d) 173, 108 N. W. (2d) 149, considered, *inter alia*, a cause of action alleged against Phillips Petroleum Company, based upon the blowing out of a Phillips tire in In-

diana, causing plaintiffs' automobile to overturn and injure them. The tire was purchased in Wisconsin. The issues of warranty were governed by the law of Wisconsin and the issues of negligence were governed by the law of Indiana.

The court held, at 154, 155, that the Indiana subordinate courts

> "* * * With at least the tacit approval of the Supreme Court, have not followed the Travis expression of Indiana law. * * *
>
> "* * * Availing ourselves of that freedom, we conclude that Indiana law does not now require its essential to liability in such circumstances that there be privity of contract between the negligent manufacturer and the party injured by the negligence."

As to *Laudeman v. Russell*, *supra* (decided prior to *MacPherson*), if it be assumed that it is contrary to *Coca Cola* (1941) and *Holland Furnace Co.* (1938), *supra*, of course these two later decisions prevail. It is not claimed that the conclusions reached in either *Travis* or *Laudeman* have been approved by the Indiana Supreme Court. Instead, we are urged by defendant to consider our holding in *Gahimer v. Virginia-Carolina Chemical Corp.*, 241 F. (2d) 836, as buttressing defendant's reliance on *Travis* and *Laudeman*. However, from our examination of our opinion in *Gahimer*, as well as the briefs filed in this court in that case, it is clear to us that the effect of the approval by the Indiana Supreme Court of the results reached by the Appellate Court in the *Coca Cola* and *Holland Furnace Co.* cases, as above pointed out, was not brought to our attention in *Gahimer* and we were left with *Travis* as the last statement of pertinent Indiana law. Hence we used the

language in *Gahimer*, at 841, now quoted by defendant in its brief, when we said,

> "In *Travis, Admx. v. Rochester Bridge Co.*, 188 Ind. 79, the latest decision *of which we are aware* by the Supreme Court of Indiana on this issue, the court states (page 84): * * *." (Italics supplied.)

But, in the case at bar, the Indiana law has been more fully briefed than in *Gahimer* and we have been made aware of the position of the Supreme Court of that state as established by its denial of transfer of the *Coca Cola* and *Holland Furnace Co.* cases which were decided about 20 years after *Travis* and about 30 years after *Landeman*.

Our late colleague, Judge Lindley, when sitting in the district court, applied Indiana law to a complaint in a negligence case before him, saying, in *McCloud v. Leavitt Corporation* (1948), 79 F. Supp. 286, 291:

> "* * * As I have said, in a tort action as I think the Indiana courts now look at it, the question is not whether there must be necessarily privity of contract but whether plaintiff has charged negligence which it might reasonably have been foreseen, would naturally and probably result in injuries to third persons. * * *"

We hold that the rule of *MacPherson* applies to this case. It is our conclusion that, under Indiana law, plaintiff has charged actionable negligence against defendant and that, if the charge is traversed, a jury question will be presented. See *Gahimer*, *supra*, 843.

2. Defendant contends that the action of the district court in dismissing the complaint can be sustained on the ground that, as a matter of law, plaintiff was guilty of contributory negligence. Whether plaintiff was guilty of con-

tributory negligence is a question of fact which should be submitted to a jury, as a matter of defense. We do not understand that the district court held otherwise.

For the reasons herein stated, the order of the district court from which this appeal was taken is hereby reversed and this cause is remanded to that court for further proceedings not inconsistent with the views herein expressed.

Reversed and Remanded with Directions.

KNOCH, *Circuit Judge* (dissenting). Regretfully, I dissent. It seems to me that in applying, to this case, the rule established in *MacPherson v. Buick Motor Co.* (1916), 217 N. Y. 382, 111 N. E. 1050, the majority have unduly extended that rule. In *MacPherson*, Judge Cardozo stated (at page 1053):

> "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract."

In *Cohen v. Brockway Motor Truck Corporation*, 240 App. Div. 18, 268 N. Y. S. 545 (1934), the majority of the court was unwilling to extend the *MacPherson* rule to cover a

defective truck door handle which gave way, causing a passenger to fall through the suddenly opened door and under the truck.

In my opinion, plaintiff in the matter before us has not stated facts which bring his case within the scope of *MacPherson*. I would affirm the order of the District Court.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

STATUTES INVOLVED

"**4-215 (1357). Jurisdiction of Appellate Court—When final—Transfer to Supreme Court—Cash deposit.**—The jurisdiction of the Appellate Court shall be final, except under the following conditions:

. . .

Second. If a petition for a rehearing is filed by any losing party in any case in either of said divisions of the Appellate Court and said petition is overruled, the clerk of said court shall not certify the opinion and judgment in said case to the lower court until the expiration of thirty (30) days from the date of said ruling.

Said parties may, at any time within thirty (30) days after his petition for a rehearing has been overruled, file in the Supreme Court an application for a transfer of the case to the Supreme Court on the ground that the opinion of said division of the Appellate Court contravenes a ruling precedent of the Supreme Court, or that a new question of law is directly involved and was decided erroneously." * * *

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 784

GENERAL MOTORS CORPORATION, *Petitioner.*

v.

LORAINE ELLIOTT, *Respondent.*

RESPONDENT'S ANSWER BRIEF TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LEON D. CLINE,
427 Third Street,
Columbus, Indiana,
HOWARD S. YOUNG, JR.,
1030 Circle Tower,
Indianapolis, Indiana,
Attorneys for Respondent.

Central Publishing Company, Inc., Indianapolis, Ind.

INDEX TO CITATIONS

	Page
American Law Reports Annotated, Second Series (ALR 2d), Vol. 74, page 1111	5
American Law Reports Annotated, Second Series (ALR 2d), Vol. 74, page 1158	5
Burns' Ind. Stat. Ann. (1933), 1946 Replacement, Section 4-215, p. 4122	3
Coca-Cola Bottling Works of Evansville v. Williams, 111 Ind. App. 502, 37 N.E. (2d) 702, 706 (1941)	3, 4
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938)	2, 3
Holland Furnace Co. v. Nauracaj, 105 Ind. App. 574, 14 N.E. (2d) 339, 342 (1938)	3, 4
Laudeman v. Russell & Co., 46 Ind. App. 32, 91 N.E. 822 (1910)	3
MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, 1053 (1916)	4, 5
McCloud v. Leavitt Corporation, 79 F. Supp. 286, 291 (1948)	4
Smith v. State, 169 Ind. 260, 82 N.E. 450, 541 (1907)	3
Swift v. Tyson, 16 Pet. 1, 18; 10 L. ed. 865, 871	2
Travis v. Rochester Bridge Co., 188 Ind. 79, 122 N.E. 1, 3 (1919)	3, 4
Wojciuk v. United States Rubber Co., 13 Wis. (2d) 173, 108 N.W. (2d) 149, 155 (1961)	4